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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 440

JOHN H. ODENBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 32b–45b) is reported at 234 F. 2d 410. The opinion of the District Court has not been reported but it is set out in the opinion of the Court of Appeals (Pet. App. 34b–39b).

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1956. A petition for rehearing was denied on July 2, 1956. The petition for a writ of certiorari was filed September 22, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in this federal condemnation proceeding, the award of compensation by Commissioners under Rule 71A (h) of the Federal Rules of Civil Procedure was properly held by the lower courts to be clearly erroneous, and, if so,

2. Whether under the facts of this case the District Court was justified in modifying the Commissioners' award to conform to the competent evidence rather than submitting the case to the Commissioners for the third time.

RULES INVOLVED

1. Rule 71A (h) of the Federal Rules of Civil Procedure provides as follows:

> (h) *Trial.*—If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in

subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

2. Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides as follows:

> (2) *In Non-Jury Actions.*—In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

STATEMENT

The United States filed a complaint in condemnation on December 27, 1951, to acquire the fee simple title to one tract and perpetual easements over other tracts of land in Greece, Monroe County, New York, for the manufacture of material for the United States Air Force and for other military purposes (5a–10a).[1]

[1] Unless otherwise indicated, references are to the Joint Appendix.

The history of this property was summarized by the District Court (2572a)—and the summary was adopted by the Court of Appeals (Pet. App. 34b–35b)—as follows:

> This proceeding involves property with buildings which were constructed early in World War II, for the fabrication of barges for war use. After World War II, subsequent to a temporary use for an industrial purpose, the main structure was converted at substantial expense by filling in the ship canal and by installing flooring and grain bins to make it usable for grain storage. After the start of the Korean War the Government appropriated it for use in the manufacture of war material. Pertinent documents in evidence fairly demonstrate that Odenbach Holding Corporation on June 15, 1950 purchased the identical property (plus about 75 acres of adjoining unimproved land) for $175,000, and that the condemnee on October 10, 1951 (less than three months prior to the taking by the Government on December 27, 1951) purchased the identical property for about $365,000 from Odenbach Holding Corporation. The purchase price involved in these sales had little, if any, influence on the award made by the Commissioners. They have determined just compensation for the taking to be $1,488,528.35.

At the trial before appraisal commissioners appointed under Rule 71A (h) of the Federal Rules of Civil Procedure, the Government adduced evidence of comparable sales, recent sales of the identical property, capitalization of income, and reproduction cost less physical, functional and economic deprecia-

tion. On the basis of these considerations, the Government's evidence showed a value up to $675,000 (702a–703a, 706a, 965a, 1261a, 2338a–2339a, 2546a–2548a, 2578a).[2]

Petitioner took the position, as the District Court points out (2572a *et seq.*), that "the only appropriate method for determination of just compensation" was reproduction cost, less depreciation (2573a). Accordingly, petitioner produced only two witnesses on the question of valuation. One was a real estate broker, Lucien A. Curre, who frankly conceded that he was not qualified to testify as to the value of the property including the improvements and who limited his testimony to an opinion of the value of the land without improvements (2117a. See also 2020a, 2021a, 2106a, 2131a). The other valuation witness, Stuart F. Kosters, was an engineer who testified as to reproduction cost of the improvements, less physical depreciation, arriving at a figure of $2,055,400.00 (1762a–1763a).

Concerning Mr. Kosters and the application of petitioner's theory of valuation, the District Court stated (2573a):

> This engineering witness had never bought or sold real estate. He made no attempt to testify as to market value of the property, nor had he attempted to determine whether there had been any sales of comparable property. He

[2] A tabulation of the Government's valuation testimony appears in Appendix A, Example 1, to the Government's brief in the court below, designated by petitioner for inclusion in the record here.

relied on his own experience for his conclusion that this type of plant was not generally on the market. The total result adopting the condemnee's theory of valuation was $2,423,010.00 (more than two million dollars in excess of the purchase price paid by the condemnee for the identical property less than three months prior to the taking by the Government).

Following the proceedings, which filled over 4,000 typewritten pages of testimony, the Commissioners filed a report dated December 23, 1954, finding that petitioner was entitled to a total award of $1,488,528.35 (2508a–2517a). The United States filed objections, while petitioner filed a motion to confirm the report with supporting affidavits (2518a–2538a). A lengthy hearing on those motions was had before the District Court on January 24, 1955, which resulted in an order directing the Commissioners to file detailed and separately numbered findings of fact and conclusions of law (2539a). After compliance with the order by the Commission, the matter was again heard by the court on February 14, 1955. The District Court concluded (2574a) that:

> * * * the amount of the award demonstrates that they [the Commissioners] erroneously arrived at their conclusion by adopting the condemnee's theory of valuation, viz., that there was no going market for the property and that land value plus reproduction cost, less physical depreciation was the sole guide. I think a mistake has been made and that the findings of the Commissioners as to fair market value are clearly erroneous, and do not have to be ac-

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cepted under Rule 53 (e) (2), Federal Rules of Civil Procedure. [Citing cases.]

Consistently, and spelling out that it did so "based upon consideration of all the pertinent factors having a bearing on fair market value, including comparable sales, recent sales of the identical property, capitalization of income, and reproduction cost less physical depreciation, obsolescence, and economic or functional depreciation," the District Court on February 16, 1955, modified the award to a total of $760,778.35 (2575a–2576a).[3]

Motions by the petitioner to vacate the order modifying the findings of the Commissioners and the order ruling on objections to the Commissioners' report and findings of fact and conclusions of law were denied by the District Court after further hearing (2595a).

The Court of Appeals unanimously affirmed the award as entered by the District Court. Characterizing the opinion of the District Court as an "excellent opinion" (Pet. App. 40b), the Court of Appeals incorporated that opinion in its own opinion. It upheld the authority of the District Court to modify the findings of the Commissioners, approved the need

[3] As the cited record reference shows, $700,000.00 of this amount was found to be the fair market value of the property; damage to the remaining lands caused by the taking was determined to be $25,000.00; and fair rental value from July 11, 1951, to December 27, 1951, during which time the Government was in possession of the property, was determined to be $42,000.00 from which there was to be deducted $6,221.65—the amount received by the condemnee or his predecessor in title as rent during that period—making a net rental recovery of $35,778.35.

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for modification on the facts of the case, and held that the revised findings of the District Court are amply supported by the evidence (Pet. App. 39b–40b).[4]

ARGUMENT

This case is not, as the petitioner would have it appear, one of an arbitrary modification of Commissioners' findings on the part of the District Court. Rather, as the two lower courts agree, it is merely an instance of appropriate action, both within express authority conferred upon the District Court and within the power and discretion—indeed, the duty—inherent in the court to make the award conform to the competent evidence in the case. Petitioner persists here, as he did at the trial of the case, in overlooking the factual deficiencies in his own evidence. On that foundation he erroneously constructs a legal issue. That legal issue necessarily falls when the evidence is considered.

Thus, in an effort to obtain review of what is primarily a factual question, i. e., the need to apply functional and economic depreciation in valuing the particular property here involved, petitioner seeks to lead this Court away from the basic issue which confronted the District Court by asserting that the property involved "was a modern unit very adaptable to heavy industry and without any functional depreciation" (Pet. 7). The two courts below found otherwise. The evidence they relied on is competent

[4] On a separate appeal by the appraisal commissioners as to the amount of compensation awarded to them for their services, the Court of Appeals modified the award to them (Pet. App. 44b–45b). That matter is not involved here.

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and substantial. The property involved was a plant constructed in wartime for building barges [5] and had been converted by petitioner himself for dead storage space (2572a; Pet. App. 34b). Large expenditures of money were necessary to rehabilitate the plant before it could again be used for industrial purposes.[6] The plant was a marginal-use facility with a bad layout for any normal use in peacetime (178a, 182a–183a, 193a, 462a, 682a, 684a, 687a–689a, 693a–695a)[7] The structures had poor and unsafe features (693a, 695a, 1195a–1196a, 1220a, 1227a–1229a, 1337a, 1478a, 1483a, 1488a, 1493a–1494a).[8] There was inadequate

[5] Following the wartime need, this and hundreds of similar facilities became a drug on the market. They were sold as surplus property at the best price available in the market, usually at but a fraction of the original construction cost. As was pointed out at the trial: "* * * the property was placed on the open market for sale to any buyer that desired it" and it was sold by the Government after advertising "for the most money it could get for it after it attempted to sell it four years" (Appendix B, pp. 64, 77, to the Government's brief in the court below, designated by petitioner for inclusion in the record here; 1542a, 1553a).

[6] For example, it was necessary for the Government to spend some $133,000.00 to place cranes and craneways in safe condition for operation (2542a, 2578a). Also, some $60,000.00 was required to make repairs to roof, windows and window sashes and installation of mullion strips (Ibid.).

[7] The main building, a structure 1,055 feet by 137 feet, embracing 144,000 square feet "contained no plumbing, toilet facilities, or heating system [although in upstate New York]" and "the premises did not have facilities for the use of gas which might be purchased from a public utility" (2540a–2541a, 2578a).

[8] Thus it was testified that weight load capacity of floors was less than required under acceptable standards (1220a) and that foundation walls were unsafe (1220a).

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plumbing (183a). There was only the high roof with no ceiling so that a ceiling had to be installed (177a–178a; Pl's Exhibit 1–w). The plant was excessive in size and capacity as shown by the fact that at the time of the taking only part of the space in the main building had been rented (694a). The equipment was antiquated (166a, 170a–171a, 362a–363a, 365a, 368a–380a, 384a, 397a, 1300a, 1854a–1856a). Finally, the economic situation had changed from an all-out war situation where such marginal-use plants were needed to a situation where the only available demand for such facility was for storage purposes and even that was limited.

Against this competent evidence necessitating functional and economic depreciation, petitioner's sole witness to over-all value, Mr. Kosters, testified that the only element of depreciation present was physical (1759a–1760a). While at this point in the record Kosters purported to have considered the matter of functional depreciation and found none, later he stated more frankly: "* * * I make no attempt to evaluate any factors other than the physical factors in my appraisal" (1815a). It is evident from his full testimony, as the courts below found, that market value was not his objective (Pet. App. 35b–36b; also see *infra,* pp. 12–13).

Therefore, the facts of this case compelled some deduction for functional and economic depreciation. Moreover, they would reasonably lead one to reduce very materially the result which reproduction cost

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less mere physical depreciation would indicate.[9] But the Commissioners did not do this. Even after the case was returned to the Commissioners for detailed findings and conclusions, their report did not discuss these factors beyond mere mention. Indeed, in summarizing the valuation of government witness Marx, they eliminate the vital elements of functional and economic depreciation (2565a). No explanation for this excision was given nor did their report elsewhere suggest any reason either in law or in fact why such factors were put aside in this case.[10] Thus, without further ground, the District Court was required to overturn the award of the Commissioners and, that being so, the basic charge by petitioner of error in the ruling must fall.

But there is further ground in the evidence relied upon by the Commissioners which required the ruling. As the District Court stated in its opinion, approved

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[9] Commissioner Corbett asked Edward C. Boehm [President of General Appraisal Company, Inc., Buffalo, New York, and a civil engineer with extensive experience as an appraiser of structures of all kinds (1091a–1097a, 1159a, 1162a)]: "Would any reasonable man in ordinary times reproduce this or any like property?" Mr. Boehm answered: "He would be very foolish if he did" (1434a).

[10] The generalization (2566a; Pet. 9) that the Commission's determination was based "on all the competent evidence, including physical, functional and economic depreciation of the buildings * * *" is no better than opinion assertion of an expert witness contrary to known fact. "Opinion evidence without any support in the demonstration and physical facts is not substantial evidence." *State of Washington* v. *United States*, 214 F. 2d 33, 43 (C. A. 9), certiorari denied, 348 U. S. 862; *International Paper Co.* v. *United States*, 227 F. 2d 201, 205 (C. A. 5); *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172, 178 (C. A. 9), certiorari denied, 340 U. S. 820.

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by the Court of Appeals (Pet. App. 36b): "I think the amount of the award demonstrates that they erroneously arrived at their conclusion by adopting the condemnee's theory of valuation, viz., that there was no going market for the property and that land value plus reproduction cost, less physical depreciation was the sole guide. I think a mistake has been made and that the findings of the Commissioners as to fair market value are clearly erroneous * * *." That just compensation is measured by the "fair market value" of the property taken and not by its cost of reproduction and the dangers to be avoided in considering the cost of reproduction without reference to "fair market value" have repeatedly been spelled out by this Court and other courts. E. g., *United States* v. *Miller,* 317 U. S. 369, 373–374; *United States* v. *Toronto Nav. Co.,* 338 U. S. 396, 403; *United States* v. *49,375 Square Feet of Land in Manhattan,* 92 F. Supp. 384, 387–388 (S. D. N. Y.), affirmed *per curiam sub nom., United States* v. *Tishman Realty & Construction Company,* 193 F. 2d 180 (C. A. 2).

Yet the effect given reproduction evidence in the proceedings before the Commissioners shows that the standard of market value was not used by the petitioner nor by the Commissioners. Neither valuation witness for the petitioner would answer questions designed to bring out market value in the sense of probable selling price for the property taken (1772a, 1838a, 2173a–2174a). Petitioner's sole witness to over-all value admitted that his instructions simply were "to appraise the physical assets on the Odenbach property which contributed to the

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facilities on the property to be taken" (1835a). And, when asked, "In a condemnation proceeding for a public utility, you are never in search of market value as such, are you?", this witness replied "As such, I have never been retained in any instance" (1823a). The only over-all valuation figure given on behalf of the petitioner did not purport to be a market value figure but was, in the words of the witness (1763a):

> * * * the summation of my estimate of the cost to reproduce all of the property on the Odenbach plant as of the date of December 27, 1951, after making allowance for my estimate of depreciation from a physical standpoint, losses due to physical factors existing as of that same date.

Petitioner's own counsel confirmed the matter beyond question. Thus, he stated with reference to the $2,055,400 estimate of reproduction cost new less physical depreciation made by petitioner's witness "I have not offered this figure as a figure of market value and when I do I will properly establish it" (1759a). He never offered such a figure. Thus, the fact is that petitioner produced no evidence of market value so that the District Court correctly refused to accept the Commissioners' award which could only be supported by petitioner's evidence of reproduction cost new less physical depreciation.

In this setting, it is plain that petitioner was not "deprived * * * of his opportunity to participate in the trial of the issue of just compensation" (Pet. 20) by the rulings and action of the District Court. The power of the District Court to modify the Commis-

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sioners' award on the case made is established by express terms of the "rules under which the case was tried" (Pet. 20) just as the standard of fair market value and the requirement of functional and economic depreciation were the settled "evidentiary rules" (Pet. 20) for valuation in eminent domain proceedings. Rule 71A (h) of the Federal Rules of Civil Procedure, *supra,* pp. 2–3, provides that the findings and report of commissioners "shall have the effect, and be dealt with by the court in accordance with the practice prescribed" in Rule 53 (e) (2), F. R. C. P., *supra,* p. 3, covering reports of masters. *United States* v. *Waymire,* 202 F. 2d 550, 553 (C. A. 10); *United States* v. *Certain Parcels of Land in Philadelphia,* 215 F. 2d 140, 145–146 (C. A. 3). Rule 53 (e) (2) expressly provides, with reference to a master's report, that if the findings are "clearly erroneous", "The court after hearing may adopt the report *or may modify it* or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." In the instant case the District Court, after "consideration of all pertinent factors" (2575a) was of the opinion that the Commissioners had made a mistake and that their findings were "clearly erroneous" (2574a). Accordingly, the District Court modified the award by the Commissioners (2575a–2576a).

Petitioner's argument that the District Court should have recommitted the case to the Commission or have had it retried to a jury, or have heard further evidence itself, would render meaningless the language of the foregoing rule. Petitioner's sugges-

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tions are only permissible alternatives. Before those alternatives are even stated, the rule provides, with respect to the report, that the court "may modify it or may reject it in whole or in part." The rule then goes on "*or* may receive further evidence *or* may recommit it with instructions."

Petitioner's arguments also ignore the factual setting of the instant case. For the reasons we have given, the court could not correctly enter judgment for the amount awarded by the Commissioners. Therefore, there remained the discretionary function whether to modify that award or to resubmit the matter to the Commissioners or to take additional evidence itself. As is customary in trials before commissioners, where there is no judge to limit the evidence, the parties had presented their cases in great detail and from every approach they believed desirable.[11] The trial proceedings extended over a total of 18 months and the transcript of testimony covered over 4,000 pages. The case had already been referred to the Commissioners for a second time. In

[11] As an example of the full opportunity for presentation of the case, the Chairman of the Commission stated, *inter alia*, "counsel for the defense [petitioner here] may have ample time and opportunity to present whatever he thinks is required and which counsel deems necessary to protect his client's case" (2498a). A member of the Commission, addressing petitioner's counsel, also stated: "I might make it perfectly clear, counsel, that if there is any further testimony that he feels should be presented on his behalf as a result of this ruling [re admissibility of evidence of prior sales], the Commission is more than willing he should be given every opportunity to produce it" (2499a). Similarly, the petitioner was accorded ample opportunity to present his contentions to the District Court in proceedings on January 24, 1955, February 14, 1955, and March 15, 1955.

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view of this record, it might have approached an abuse of discretion to have resubmitted the matter to the Commissioners for further prolongation of the proceedings. There is discretion in trial courts to limit the number of times a party may develop his case. Plainly, the only appropriate action was modification of the award on the record made, to reflect the clearly existing functional and economic depreciation and to adjust the award to fair market value. This is accepted judicial practice. Thus, in *United States* v. *City of New York*, 165 F. 2d 526, 531 (C. A. 2), the court made it clear that for "the judge to proceed upon the evidence already taken" before commissioners is perfectly proper. Similarly, in *Matter of Hand Street*, 52 Hun 213, 5 N. Y. Supp. 158, 161, the court spelled out that it should be guided in its correction of an award by a commission "by the evidence presented before the commissioners bearing on the question of damages."

Petitioner complains (Pet. 13) of the amount awarded for severance damage or for rental value for a five-month period, asserting that the court did not even hold that the Commissioners' findings as to these items were clearly erroneous. The amount of these items is to be determined by reference to fair market value, hence these findings were embraced within the District Court's conclusion that the Commissioners' findings "as to fair market value are clearly erroneous" (2574a). And, in sustaining the Government's requested finding of fact number 20 concerning rental value (2543a, 2578a), the District Court obviously found that the Commissioners' find-

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ing of rental value in the amount of $61,200 (2567a)—nearly double the amount stated in the sustained finding—was "clearly erroneous." Certainly, when it appeared that the Commissioners' determination of fair market value for the property was excessive for failure to consider essential elements of that value it followed that the award for rental value as well as for severance damages had to be adjusted to fair market value.

By disregarding language used by the Court of Appeals and by attributing the wrong reason to that court's action, petitioner would have this Court reach an erroneous conclusion. Thus, petitioner states (Pet. 14) "The Court below did not properly discharge its responsibility for reviewing the correctness of the District Court's rejection of the Commission's Report, by affirming the District Court's Opinion on the basis of a holding that the District Court's substitute findings were not in themselves clearly erroneous. * * *" But the Court of Appeals makes it clear that it is in agreement with the District Court that the findings of the Commission were clearly erroneous. Thus, immediately preceding the language to which the petitioner takes exception, the Court of Appeals states (Pet. App. 39b–40b):

> Rule 71 A (h), together with Rule 53 (e) (2) gave the judge authority to reject, in part, a finding of the Commissioners if "clearly erroneous" and to modify their award accordingly. He was not obliged to, although he had discretion to, remand their report to the Commissioners for a revised finding.

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> It is obvious *to us,* and it was to the judge, that, in valuing the property, the Commissioners (despite their statement that they took all pertinent factors into consideration) relied primarily on reproduction-cost-new less depreciation. The judge, in his excellent opinion, *properly rejected* such a valuation. * * * [Emphasis supplied.]

Thus, the affirmance was based on express concurrence by the Court of Appeals that the Commissioners' findings were "clearly erroneous." The fact that the Court of Appeals went on to express its view that the District Court's revised valuation is amply supported by the evidence and that it is not "clearly erroneous" in no way alters the basis of the affirmance. And, rather than indicating an improper discharge of its responsibilities by the Court of Appeals, it demonstrates a thorough discharge of its duties by that court. The Court of Appeals both found that the District Court properly rejected the "clearly erroneous" findings of the Commission and that the District Court's own findings were amply supported by the evidence and were not clearly erroneous.

The decisions below do not conflict with the decisions of any other court. The cases, relied upon by petitioner (Pet. 10), in which the courts did not overturn the commissioners' reports because of the particular facts involved in them, announce no rule against modification generally and establish no precedent applicable to the different facts in the present case. Petitioner's citations relating to the "weight" of the evidence (Pet. 12) and relating to findings "amply supported by the evidence" (Pet. 13–14) do not apply here where the ruling was based on lack

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of competency rather than the weight of the evidence. The decision in *United States* v. *Waymire,* 202 F. 2d 550, 553–554 (C. A. 10), which petitioner asserts is in conflict with the decision here (Pet. 18), on the contrary, spells out the broad power of review under Rules 71A (h) and 53 (e) (2) in full support of the decisions below, as follows:

> * * * Under the plain language of Rule 53, it is the duty of the court to accept the findings of fact made by a master unless they are clearly erroneous. But the findings of a master may be modified in part, or rejected in toto, if they are clearly erroneous. In like manner, under the equally clear language of Rule 71A (h), the findings and awards of a commission shall be accepted unless they are clearly erroneous. But they may be modified in part, or rejected in toto, if they are clearly erroneous. And even though there is evidence to sustain findings of a master or a commission, as the case may be, they are clearly erroneous if the reviewing court on the entire evidence has the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; *United States* v. *Oregon State Medical Society,* 343 U. S. 326, 339, 72 S. Ct. 690, 96 L. Ed. 978.
>
> Upon review, it was the duty of the court to accept the awards of the commission unless they were clearly erroneous in whole or in part because based upon a substantial error in the proceedings, because based upon a misapplication of the controlling law, because unsupported by substantial evidence, or because contrary to the clear weight of all the evidence. And while it was incumbent upon the court to proceed with

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> due regard for these general principles, if on the whole record the court was clearly convinced that in fixing just compensation for the property taken the commission acted arbitrarily and without proper regard for the evidence, or that the awards were unsupported by any substantial evidence, or that they were against the clear weight of all the evidence, it was the duty of the court to modify them, reject them in whole or in part, receive further evidence, or recommit the matter to the commission with instructions.

Finally, decisions (Pet. 15–17) treating with the power of courts of appeals to modify the findings of facts by district courts are not helpful in these circumstances.

CONCLUSION

The case does not warrant review by this Court because the issues of fact have been correctly resolved by concurring decisions of the two courts below, the single legal issue is settled by express and unambiguous language of the Federal Rules of Civil Procedure which merely preserves historic practice, and there is no conflict of decisions. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 440

JOHN H. ODENBACH,

Petitioner,

and

44.00 ACRES OF LAND, MORE OR LESS, SITUATE IN THE TOWN OF GREECE, COUNTY OF MONROE, STATE OF NEW YORK,

Defendant,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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BLEED THRU

In the

Supreme Court of the United States

October Term, 1956

No. 440

John H. Odenbach,

Petitioner,

and

44.00 Acres of Land, More or Less, Situate in The Town of Greece, County of Monroe, State of New York,

Defendant,

against

United States of America,

Respondent.

REPLY BRIEF OF PETITIONER

The Brief for the United States implicitly acknowledges the correctness of petitioner's position on at least three of the questions presented.

A.

Respondent argues, without benefit of citation, that a finding of Commission error with relation to reproduction cost testimony in fixing market value of the lands taken in fee requires, *ipso facto*, that unrelated, independent findings of severance damage and fair rental value must necessarily also have been in error (Resp. Br., p. 16).

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This association is untenable. Severance damage, which by definition relates only to the diminished value of lands of petitioner which were *not* taken, has nothing to do with reproduction cost. The District Court made no attempt so to find nor did the Court below.

The plain fact is that the Court below sanctioned the promulgation of *de novo,* reduced determinations of severance damage and fair rental value by the District Court, to petitioner's detriment in the sum of $60,722, without any basis for suggesting that these independent aspects of the award were erroneous. This holding sanctions the completely novel proposition of the District Court's power of unfettered substitution of its opinion of just compensation for that found by the Commission. This is contrary to the plain requirements of Rule 53(e)(2) of the Federal Rules of Civil Procedure and all relevant adjudications thereunder.

B.

Respondent's Brief argues that the power to "modify" sanctions the District Court's summary promulgation of a new award (Resp. Br., p. 13, et seq.). Unlike respondent's Brief in the Court below, there is not now a single case cited, which is claimed to constitute an adjudication that a power to "modify" imparts to the District Court the power to put itself in the shoes of the Commission and make a wholly new initial determination of just compensation. Respondent has not even discussed or attempted to distinguish the cases cited by petitioner on pages 17 and 18 of his Brief which show that the prior adjudications on this question are *contra.*

Respondent evades this fundamental issue by characterizing the District Court's action as a mechanical or ministerial performance, one which simply made the award "conform to the competent evidence in the case" (Resp.

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Br., p. 8). But respondent's own Brief refutes that description. At page 5, respondent says that its own evidence, which was all that remained after the District Court's excision of petitioner's evidence, indicated a value not in excess of $675,000. At page 7, respondent acknowledges that the District Court fixed a value of $700,000. On the face of its Brief, respondent acknowledges that there was a *de novo* determination. This fact, together with the absence of any authority to justify this wholly new power of the District Court, required a reversal below.

C.

Respondent cites *United States* v. *City of New York*, 165 F. 2d 526, 531 (C. A. 2d, 1948) as its authority for the action of the District Judge in summarily propounding the *de novo* findings on the issues without remand to the Commission (Resp. Br., p. 16). That case is wholly distinguishable. Rule 71A(h) of the Rules of Civil Procedure was not then in effect. It was there very specifically held that the District Court could have determined the issue of just compensation in the first instance without the use of Commissioners. Under Rule 71A(h), the requirement is plainly otherwise, where, as here, petitioner demanded a trial by jury.

Furthermore, in the *City of New York* case, even though the District Court was held to have had a complete right to dispose of the issues, the Court of Appeals nevertheless remanded, with specific directions that the District Court take such further evidence on the issues as the parties desire to offer. Under Rule 71A(h), the proposition is plainly *a fortiori*, particularly where respondent acknowledges that the District Court's ruling here "was based on lack of competency" of evidence previously received by the Commission (Resp. Br., pp. 18-19).

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Conclusion

The new Federal procedures governing condemnation cases are in constant and recurring use in all District Courts. The goal of the new Rule is uniformity. The holding below sanctions a radical and far-reaching departure from the entire course of prior adjudications. The Commission form of trial is virtually destroyed. If the holdings below represent an "historic practice" (Resp. Br., p. 20), despite the absence of a single case so holding, then this Court should so state. If the holdings do not represent such practice, and to the contrary represent a fundamental deviation therefrom and a completely novel delineation of a Commission's functions, then those errors call for correction in the interests of proper and consistent judicial administration of the Federal Rules of Civil Procedure.

Respectfully submitted,

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